

D4C0NOR1 Argument

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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NORTH AMERICAN OLIVE OIL  
ASSOCIATION,

Plaintiff,

v.

13 CV 0868

KANGADIS FOODS,

Defendant.

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New York, N.Y.  
April 12, 2013  
12:30 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

SIDLEY AUSTIN LLP  
Attorney for Plaintiff  
BY: TIMOTHY TREANOR  
NITIN REDDY

FARRELL FRITZ, P.CL  
Attorney for Defendant  
BY: MICHAEL SCHOENBERG

Present: Erin Balch

Themis Kangadis

1 (In open court)

2 THE COURT: So I'm extremely sorry for the extended  
3 delay. Another matter that I just had to deal with came up.

4 I'm ready to hear argument. This is North American  
5 Olive Oil Association vs. Kangadis Food, Inc.

6 MR. TREANOR: Tim Treanor from Sidley Austin here for  
7 the North American Olive Oil Association. With me is my  
8 partner Nitin Reddy, and Erin Balch, who is executive vice  
9 president of the NAOOA.

10 Your Honor, I would request, Mr. Reddy is a member of  
11 the bar in California, and I would request that he be admitted  
12 pro hoc vice for purposes of this matter, although I expect to  
13 be addressing the Court today.

14 THE COURT: That is fine, but why didn't you file, in  
15 advance, the requisite form?

16 MR. TREANOR: Your Honor, our apologies for not doing  
17 that. We got a Certificate of Good Standing for Mr. Ready on  
18 April 8. So we do have the paperwork together now to actually  
19 make the filing, but we had not done that, we have not done it  
20 as of yet.

21 Mr. Reddy flew in from California yesterday --

22 THE COURT: April 8 was --

23 MR. TREANOR: Four days ago, your Honor.

24 THE COURT: Four days ago.

25 MR. TREANOR: Yeah.

1 THE COURT: So, do you need to tell your clients from  
2 now on you that Sidley Austin is incapable of putting together  
3 a two-page form application --

4 MR. TREANOR: No, don't --

5 THE COURT: -- in four days?

6 MR. TREANOR: -- I don't think we'll be telling our  
7 clients that, your Honor.

8 THE COURT: All right. Well, anyway, he is admitted,  
9 but let's make sure we get that in.

10 MR. TREANOR: Thank you, your Honor.

11 THE COURT: All right.

12 MR. SCHOENBERG: Michael Schoenberg for Kangadis  
13 Foods. With me is the president the Kangadis Foods.

14 THE COURT: Just before we begin, I received this  
15 morning the complaint in a new case that appears to be based on  
16 the same general set of allegations, but is a putative class  
17 action filed by an individual plaintiff Joseph Eben and  
18 Yeruchum Jenkins -- it's an interesting combination.

19 Is defense counsel aware of that case?

20 MR. SCHOENBERG: I had not. I was not aware the  
21 complaint had been filed. I received a letter from plaintiff's  
22 counsel saying they might be filing such a complaint.

23 THE COURT: Why don't you contact, assuming you're  
24 gonna be representing Kangadis in that case, as well, contact  
25 the plaintiff's counsel once you have pulled this off of Pacer

1 and let's have a telephone conference, certainly by next  
2 Tuesday. Because we might as well just have the same case  
3 management plan for both cases, it seems to me. But we'll need  
4 to hear from them.

5 MR. SCHOENBERG: All right. So let me hear from  
6 moving counsel, and then from defendant counsel.

7 MR. TREANOR: Yes, your Honor.

8 This matter is Lanham Act case. It's a false  
9 advertising case. It's the plaintiff's position that the  
10 defendant's product advertisements are literally false. The  
11 products at issue are --

12 THE COURT: No, I know all that, and forgive me. I  
13 guess, I can understand -- well, I guess the first question I  
14 have is, there is some sort of letter sent umpteen years ago,  
15 and your adversary says that, therefore, you have sat on your  
16 hands, what about that.

17 MR. TREANOR: Well, your Honor, one of the programs  
18 that the NAOOA has is a program for monitoring the marketplace  
19 for product that does not meet international standards and  
20 labels. And during the course of that monitoring program NAOOM  
21 found some samples that were believed to contain pomace, and  
22 put Mr. Kangadis on notice of that. And that was back in 2007.  
23 Nothing happened. Apparently, as a result of that, the  
24 association was unaware of the extent of the conduct. We have  
25 learned, through the response papers of the defendant, that in

1 fact not only was the defendant selling entirely pomace, not  
2 just blended or adulterated olive oil that was adulterated with  
3 pomace but, in fact, entirely pomace, and doing that for the  
4 course of the last five years at least. That was not known to  
5 association. It was merely part of the monitoring program to  
6 put them on notice. There was the possibility that they had  
7 not handled their product properly, that they were not caring  
8 for their product.

9 As a result of that, the hope was that Kangadis would  
10 address the issue, and make sure that their products were in  
11 compliance with the various labeling standards and the like.

12 That didn't happen. They have aggressively grown  
13 their market share as a result of selling what is not olive  
14 oil, a product that does not meet the standards set, in any  
15 regulatory or industry association body, standard-setting body,

16 And more recently, additional testing was done. And  
17 the association spent time and effort to approach this thing  
18 very seriously. The association has never taken an action like  
19 this before. Care and attention was put into building a case  
20 that would be solid, and that we could come before your Honor  
21 and be able to establish, very clearly through one of the  
22 world's foremost experts, that in fact this was adulterated  
23 product. And, indeed, we are here now with the defendant  
24 essentially conceding the key fact, which is that -- and more  
25 than frankly, we expected, because it's not just that they have

1 some product out there that contains some pomace, it is that  
2 all of their products, at least their 100 percent virgin olive  
3 oil product is all pomace, and has been for five. years. And  
4 so the facts have changed quite significantly --

5 THE COURT: Didn't they say they are fixing that?

6 MR. TREANOR: Well, they have represented in their  
7 papers, that as of March 1 they have replaced the product in  
8 their tins with something that they have stated meets USDA  
9 stated standard for olive oil.

10 First of all, they have done nothing about product  
11 that is out there in the marketplace already. And when they  
12 have 15 percent of the market share in the nation, that's a lot  
13 of olive oil that is out there that is falsely labeled,  
14 continues to be, no doubt, be sold and consumed. They have  
15 done absolutely nothing about that.

16 In addition, we don't believe that the Court should  
17 accept, necessarily, the representation, when the facts are  
18 that they have been on notice that their products are falsely  
19 advertising the contents of their tins for the amount of time.  
20 And given the volume that they have sold, we don't believe that  
21 the Court should accept that representation as sufficient.

22 I would also note that, as a matter of -- under the  
23 case law that's out there, the violation cannot -- the Court's  
24 power to act on the violation is not necessarily mooted by the  
25 action that the defendant is taking.

1 And if that were the case --

2 THE COURT: No, I agree with that.

3 But, it's one thing to say the matter is not moot, I  
4 don't think it is moot, I'll hear from your adversary on that  
5 if he wishes to pursue that. But that's of the not the same as  
6 saying you are entitled to injunctive relief.

7 For example, you ask for them to institute appropriate  
8 quality control measures. Why should you be entitled to that?

9 MR. TREANOR: Well, your Honor, I think that's the  
10 least important of the relief we've requested.

11 THE COURT: Good. So, we can go home.

12 MR. TREANOR: No, I wouldn't say that, your Honor.

13 THE COURT: You better tell me why you're entitled to  
14 it.

15 MR. TREANOR: That relief was requested, because of  
16 the concerns that perhaps there was a quality control issue  
17 here.

18 We've got a defendant who has been caught red-handed;  
19 with a massive amount of product that's been distributed all  
20 over this country, and is now, because it's before this Court,  
21 is now saying, okay, you have got us, we're going to switch the  
22 product, but we believe that we are free to continue to act as  
23 we had before, if we so choose. And we have a concern that the  
24 way --

25 THE COURT: Yeah, well, so, I understand why you would

1 wish, if you otherwise satisfy the standards for injunctive  
2 relief for an order barring them from selling as 100 percent  
3 pure olive oil, any product containing pomace or any other  
4 substance that is not more narrowly known as olive oil, and  
5 from selling any product containing pomace without labeling it  
6 as such.

7 MR. TREANOR: Right.

8 THE COURT: But I'm perplexed as to what showing, if  
9 any, you have made that you're entitled to, quote, "quality  
10 control measures." And I still haven't heard any.

11 MR. TREANOR: Well, your Honor, it was our belief  
12 that, based on the facts that we are encountering, that there  
13 was a quality control issue. We have not submitted facts to  
14 establish that there is in fact a quality control issue.

15 I would say, however, that given the fact that this  
16 defendant was selling pomace as olive oil for five years, and  
17 that's 15 percent of the product that is out there in this  
18 country, up until March 1, that that speaks to the potential  
19 existence of a serious quality control issue. It speaks to no  
20 quality control within Mr. Kangadis' operation.

21 So that would be the basis for our requested relief.  
22 The key relief that we seek, however, is the other points that  
23 we have raised as the focus of injunctive relief. And that is  
24 that they not market pomace as 100 percent pure olive oil any  
25 longer. And, also, that they notify anyone, customers and the



1 like, who have received product that is mislabeled that it, in  
2 fact, contains pomace.

3 THE COURT: All right. One other thing -- well, let  
4 me hear from your adversary, and we'll come back to you in a  
5 minute.

6 MR. SCHOENBERG: May I use the podium, your Honor?

7 THE COURT: Sure.

8 MR. SCHOENBERG: To begin with, I think your Honor  
9 brings up a very good point. 2007, six years ago, the  
10 association has made the identical claims they are making now.

11 And if you look at exhibit B to our opposition, you  
12 would see their letter from March 22, 2007, where they  
13 specifically allege --

14 THE COURT: So how come you didn't do, then, what you  
15 say you have done now?

16 MR. SCHOENBERG: Because, your Honor, we don't believe  
17 there is any federal regulation, or state law, or regulation,  
18 especially not in 2007 that required them to do that, to change  
19 the label, as the association wanted.

20 THE COURT: So now the assertion then is that  
21 regardless of whether there is a standard or not, the common  
22 understanding of olive oil is not what you are selling. So  
23 that's not maybe what you regarded the letter to be about,  
24 therefore it's not something that's, in effect, been the  
25 subject of delay.

1 MR. SCHOENBERG: Well, I would disagree that  
2 the product that we were selling, the pomace oil, was not olive  
3 oil in the colloquial sense.

4 THE COURT: I know you disagree with that, but I  
5 disagree with you on that, and you're going to waste your time  
6 if you argue that.

7 MR. SCHOENBERG: If I could address another point of  
8 the delay.

9 THE COURT: Yeah.

10 MR. SCHOENBERG: The case law is legion, 4 months  
11 delay between knowledge and bringing in an injunction  
12 application is too long, too long to sit on the rights.

13 It took Mr. Professor Conte 4 months, after it had  
14 taken, several months to get the supplies to them before this  
15 injunction application was made. We are talking about close to  
16 about half a year since the samples were first sent to  
17 Professor Conte. It doesn't take that long to test olive oil.

18 They didn't test in '07, they knew it, they waited.  
19 And the reason they waited isn't out of some altruistic motive  
20 toward the public, it's because Kangadis is doing well in the  
21 marketplace. Because they have started competing with some of  
22 the association's biggest members. And they have recently  
23 gotten contracts with Wal\*Mart. And that's a direct threat to  
24 their members who are not parties to this litigation. That's  
25 the motive behind this litigation. It's not there is some

1 public harm, there isn't.

2 The public is getting a good product, an olive oil  
3 product, according to Ms. Balch. An olive oil product for less  
4 money than they would spend for extra virgin olive oil, virgin  
5 olive oil, or other types of olive oil. And according to  
6 Ms. Balch's testimony, it's equally as healthy. It is olive  
7 oil. It is from a different part of the olive, there is no  
8 question about that, but olive pomace is olive.

9 THE COURT: The substance that you are now using,  
10 since March, is different from pomace; yes?

11 MR. SCHOENBERG: It is a different grade of olive oil;  
12 that's correct.

13 THE COURT: And, well, but you have chosen,  
14 voluntarily, to use it; correct.

15 MR. SCHOENBERG: Yes.

16 THE COURT: So you don't think, apparently, that your  
17 market will be affected by the switch?

18 MR. SCHOENBERG: No, absolutely not. Capatriti 100  
19 percent pure olive oil is a loss leader for Kangadis Foods. So  
20 whether they are filling it with olive pomace oil, or what they  
21 are currently selling as olive oil, ultimately, it doesn't make  
22 a difference.

23 THE COURT: So why aren't you agreeable to an  
24 injunction that says that, from now on, you will just -- you  
25 wouldn't use pomace, you will use this other stuff.

1 MR. SCHOENBERG: That is an excellent question, and  
2 I'll tell you why.

3 THE COURT: Uh-huh.

4 MR. SCHOENBERG: Just like they brought this suit to  
5 complete unfairly through litigation against the competition,  
6 the association has shown a penchant for running to the press.

7 Indeed, this lawsuit was filed February 6, February 6  
8 that morning before the lawsuit was available on Pacer, there  
9 was an article in the New York Times saying how Kangadis is the  
10 worst thing since the devil, and what they're doing is terrible  
11 in the marketplace, and they're selling rancid oil, what have  
12 you.

13 An injunction, in a public document, there is an  
14 absolute certainty that the association is gonna run around to  
15 competitors, waving it in front of their faces: See, we were  
16 right, Kangadis is doing something wrong, even the judge agreed  
17 to it.

18 So rather than have a public document out there, we  
19 choose to -- it. We believe that moots the complaint.

20 THE COURT: Let me go back to your adversary, I'll  
21 come back to you in a minute, also. Thank you.

22 So what was this Times article, or what was the -- is  
23 this something instigated by your client?

24 MR. TREANOR: There was a New York Times article, your  
25 Honor. And part of the approach of the organization was to not

1 only bring the case, but also focus some attention on this  
2 issue. Obviously, it's a very serious issue. It's a clear  
3 issue. We've gotten a food product that has not been getting  
4 much --

5 THE COURT: One has to worry if you're asking the  
6 Court to exercise its equitable powers, and no court wants to  
7 be made the pawn of a press warrant.

8 If I were to grant, in part or in whole, your  
9 requested injunction, what plans if any do you have to notify  
10 the press?

11 MR. TREANOR: Your Honor, there are no plans to notify  
12 the press.

13 I do think that part of this association's mission is  
14 to draw attention to this particular issue. It is not a  
15 mission in terms of this lawsuit, necessarily, but it's part of  
16 the overall mission of the association.

17 THE COURT: Well, I -- that, of course, I understand,  
18 but that's different than using a lawsuit as a weapon in a  
19 media event. The Court is not blind, of course, to the fact  
20 that frequently happens, doesn't make it appealing to the  
21 Court. Was this was an article -- does someone have a copy of  
22 that article?

23 MR. SCHOENBERG: Yes.

24 MR. TREANOR: I have a copy of it, your Honor.

25 (Pause)

1 THE COURT: Yes, well, what day was the complaint  
2 filed in this case?

3 MR. REDDY: February 6th.

4 THE COURT: Pardon?

5 MR. REDDY: February 6.

6 MR. TREANOR: February 6.

7 THE COURT: February 6.

8 And when was it served on the defendant?

9 MR. TREANOR: Your Honor, I believe it was dropped  
10 served that same day. I'm not entirely certain of that.

11 MR. SCHOENBERG: No, it was at least two days later.

12 THE COURT: Because what we have here, while it's -- I  
13 wouldn't agree with defense counsel that it carried quite the  
14 moral or religious connotations that he suggested, is an  
15 article that in which not only the North American Olive Oil  
16 Association, but its counsel, make statements about the merits  
17 of the case to the press at a time when it appears that the  
18 defendant either had just received it or certainly had not had  
19 a chance to digest it.

20 The docket shows that service was accomplished on  
21 February 7th. This article is dated February 6th, the date of  
22 the lawsuit being was filed. So even before the defendant is  
23 served, we have plaintiff's counsel, as well as the association  
24 trumpeting their allegations.

25 So, for example, according to the article that

1 appeared in the New York Times, it has the following quote from  
2 Mr. Trainer: Quote, "This is a very, very clear-cut case of  
3 false advertising," said Timothy J. Treanor, a lawyer at Sidley  
4 Austin, who is representing the association. "This is not a  
5 case where there is room for argument about the degrees of  
6 truthfulness. Here, 100 percent olive oil is what it states on  
7 the tin and, by any standard, that's not true."

8 I will note that in the original version of this  
9 article, Mr. Treanor's name was misspelled. And he must be  
10 very gratified that they corrected that.

11 So do I have to be concerned, because a preliminary  
12 injunction is not a final determination of the merits, and  
13 contrary to Mr. Treanor's suggestion to the press, the  
14 determination of the merits had not been already determined  
15 when the plaintiff filed its complaint.

16 But, in any event, do I have to be concerned that if I  
17 issue an injunction, the North American Olive Oil Association,  
18 let alone, its counsel, will be going to the press and saying  
19 see, the judge has said that the other side engaged in false  
20 advertising.

21 MR. TREANOR: Well, your Honor, it's not our current  
22 intention. We do not have.

23 THE COURT: Because that wouldn't be true, would it  
24 counsel?

25 MR. TREANOR: No, it would not be true, your Honor,

1 we --

2 THE COURT: That would be a case of false advertising,  
3 in effect, by the North American Olive Oil Association.

4 MR. TREANOR: Yes, it would. In fact, your Honor,  
5 this was a big step for the association. The steps were taken,  
6 as I have said, to make sure that the complaint got some  
7 attention. Nothing was said that we don't stand by  
8 100 percent.

9 THE COURT: Did you tell the reporter who interviewed  
10 you that your firm had, in fact, not yet even served your  
11 adversary?

12 MR. TREANOR: No, your Honor, the question wasn't  
13 asked. But it was not --

14 THE COURT: So I see they called Mr. Kangadis. It  
15 says Themis Kangadis, an executive with the company, said he  
16 had not heard of the lawsuit, and would ask the company's  
17 lawyers to look into it, quote, "I had no idea," close quote,  
18 Mr. Kangadis said.

19 He, in effect, was blind-sided because he had not even  
20 been served with the complaint.

21 MR. TREANOR: Well, your Honor, I do believe that were  
22 attempts that day made to serve Mr. Kangadis. I don't believe  
23 he knew about the lawsuit on the sixth, so, you know, your  
24 Honor's observation is correct.

25 THE COURT: Certainly on the seventh, according to the



1 docket sheet.

2 MR. TREANOR: Right.

3 With regard to the preliminary injunction, your Honor,  
4 it is not our intention to go out and advertises it. The  
5 association is seeking the relief that it is asking for. And  
6 it's not part of the strategy to draw attention to preliminary  
7 relief.

8 THE COURT: Let me go back to defense counsel.

9 Thank you, counsel.

10 THE COURT: How much of your product is still out  
11 there in retail stores that doesn't that contain pomace as  
12 opposed to the new stuff?

13 MR. SCHOENBERG: It's an incredibly difficult question  
14 to answer.

15 THE COURT: Well, that's what I get paid to do, put  
16 those questions.

17 MR. SCHOENBERG: Given the amount of time that has  
18 passed since the changeover, talking about more than a month at  
19 this point, I would imagine not much. The problem with  
20 answering that question is we don't sell, Kangadis doesn't sell  
21 directly to Stop And Shop, A&P, what have you. They sell to  
22 brokers, who then palletize whatever products; you know, salad  
23 dressings, vegetables that the supermarket then needs, and then  
24 ships that off to the supermarket. So we can't say with any  
25 great certainty which supermarkets contain our products, other

1 than Wal\*Mart, obviously. Or even further down the economic  
2 chain, which final ultimate consumers have actually bought the  
3 product. So a letter to every supermarket would be overbroad.  
4 And given that that would be a mandatory injunction, I don't  
5 think that the association has met that standard. Such a  
6 letter to ultimate consumers, the individuals, like all of us,  
7 would be impossible, couldn't do it. If we had to send a  
8 letter to the buyers, the middlemen, it could be done. And I  
9 think that's something we could potentially be amenable to.

10 In terms of the publicity, as well, I have discussed  
11 this with Mr. Treanor, and we would be, depending on the terms,  
12 I shouldn't say happy, but we would probably be interested in  
13 entering into some sort of settlement agreement with injunctive  
14 relief that prevents us from doing what they claim that we were  
15 doing in the past, just like your Honor was saying, and that  
16 settlement agreement would then be confidential. And if we  
17 were to breach the settlement agreement, which we wouldn't,  
18 then we --

19 THE COURT: You are talking to the wrong judge when  
20 you are talking about "confidential." I can't prevent you  
21 from, if you reach a settlement that's confidential, I can't  
22 prevent you from keeping it confidential.

23 MR. SCHOENBERG: I guess the point --

24 THE COURT: Very, very unappealing as a matter of  
25 general policy, having nothing to do with this case.

1 MR. SCHOENBERG: I understand. I mean as an  
2 alternative, I was just thinking as we were sitting here, such  
3 an injunction, or consent injunction, Mr. Treanor and I would  
4 work it out.

5 THE COURT: Well, here is the injunction I propose to  
6 issue in about five minutes.

7 After certain preliminary stuff: Defendant is hereby  
8 preliminarily enjoined, (1) from selling as, quote, "100  
9 percent pure olive oil" any product containing pomace, or any  
10 other substance that is not commonly known among consumers or  
11 among recognized standard setters as olive oil. And, (2) from  
12 selling any product containing pomace without expressly  
13 labeling it as such.

14 So I would not ask you to recall anything that is out  
15 there, now, and I would not ask you to take this to quality  
16 controls, but I would ask you, on pain of contempt -- not ask  
17 you, I would order you, to do it in effect what you say you  
18 have been doing voluntarily since March 1. And hereinafter do  
19 it forever that way, or at least until we reach the merits of  
20 this lawsuit. Forever is a little strong, maybe given my  
21 normal standards, we are talking 6 to 9 months, that's a rough  
22 approximation of forever.

23 So, do you object to that?

24 MR. SCHOENBERG: Generally, no, I think it's the  
25 second clause in the first part of the relief. I couldn't get

1 it all down, but --

2 THE COURT: Let me read it to you again.

3 And I want to hear from plaintiff's counsel, as well.

4 Defendant is hereby preliminarily enjoined: (1) from  
5 selling as, quote, "100 percent pure olive oil," any product  
6 containing pomace or any other substance that is not commonly  
7 known among consumers, or among recognized standard setters, as  
8 quote, "olive oil," close quote; and (2) from selling any  
9 product containing pomace without expressly labeling it as  
10 such.

11 MR. SCHOENBERG: Again, the issue is the second  
12 clause of the first part of the injunctive relief having to do  
13 with "commonly known by consumers as olive oil."

14 USDA, if we had a defined standard, say USDA standards  
15 which are voluntary --

16 THE COURT: If you want to use that one, I'll hear  
17 from plaintiff's counsel, but I could make that --

18 MR. SCHOENBERG: The problem is that doesn't define,  
19 quote/unquote, "olive oil."

20 THE COURT: All right.

21 MR. SCHOENBERG: They have different grades, so.

22 THE COURT: So, I'm willing to -- how would you define  
23 it, assuming as you should, I repeat except I'm not going to  
24 treat any pomace-based product as olive oil.

25 MR. SCHOENBERG: Well, I think that you could strike

1 that second clause where it is subjective as to what consumers  
2 believe, or standards setter believe, and just keep it with  
3 pomace, olive pomace oil. From selling.

4 THE COURT: The only reason I had that in, is I didn't  
5 want to create a loophole where there is something else you  
6 could substitute. But if you want to give me some alternate  
7 language, I'm perfectly happy to hear that.

8 MR. SCHOENBERG: Well, I think that we could use  
9 the -- and before I commit to something, I'd really like to  
10 speak with Mr. Kangadis.

11 THE COURT: Of course.

12 MR. SCHOENBERG: But I think we could use USDA  
13 Standards Section 52.1534, which is called grades of olive oil,  
14 so that you couldn't sell 100 percent pure olive oil as any  
15 product containing anything other than those grades. And the  
16 reason I raise that, is there is a separate grade of olive  
17 pomace oil, Section 52.1535 to be excluded.

18 THE COURT: You are enjoined from selling as has 100  
19 percent pure olive oil any product containing pomace or any  
20 other substance that is not in accord with -- give knee that  
21 section again?

22 MR. SCHOENBERG: You could say: Not sell 100 percent  
23 pure olive oil if it contains any of the grades of olive pomace  
24 oil referenced in Section 52.35 of the USDA voluntary  
25 standards.

1 THE COURT: Let me hear from the other side. I don't  
2 recall, did you submit a proposed preliminary injunction order?

3 MR. TREANOR: Your Honor --

4 THE COURT: I don't think so.

5 MR. TREANOR: We proposed, generally, the relief we  
6 were seeking, but we have not proposed the language.

7 THE COURT: You did not.

8 MR. TREANOR: We did not.

9 THE COURT: So what language would you use?

10 MR. TREANOR: Your Honor, we're fine with the USDA  
11 standard.

12 THE COURT: Okay. So: Enjoined from selling as 100  
13 percent pure olive oil, any product containing pomace or any  
14 other substance that is not in accord with -- is that the way  
15 to put it -- and give me the USDA standard 52.35.

16 MR. TREANOR: 52.1534, grades the olive oil.

17 THE COURT: All right, wait, does someone have that  
18 there?

19 MR. TREANOR: Yes.

20 THE COURT: Let me just copy it down.

21 MR. TREANOR: There is one section on grades of olive  
22 oil, and one on grades of pomace oil.

23 THE COURT: Now, you folks are more expert in this  
24 than I am, but it looks to me like it could be, the wording  
25 could be: Enjoin one from selling as 100 percent pure olive

1 oil any product containing pomace or any other substance that  
2 is not in accord with USDA section 52.1534(a) or (b).

3 MR. SCHOENBERG: May I be heard?

4 THE COURT: Yes.

5 MR. SCHOENBERG: There is a difference between virgin  
6 olive oil, and extra virgin olive oil, and quote/unquote  
7 "capital O" olive oil. Those are different grades. Each one  
8 of those.

9 THE COURT: You presumably are not wanting to sell  
10 (c), which is US virgin olive oil not fit for human  
11 consumption.

12 MR. SCHOENBERG: That's right. What we're actually  
13 selling is either (d) or (e).

14 THE COURT: I'm sorry (d).

15 MR. SCHOENBERG: (d) or (e).

16 If we were selling virgin olive oil, or extra virgin  
17 olive oil, this would be a --

18 THE COURT: So neither (d) nor (e) can contain pomace.

19 MR. SCHOENBERG: Correct.

20 THE COURT: I see.

21 MR. SCHOENBERG: Yes.

22 THE COURT: All right, so we could just say, (a), (b),  
23 (d), or (e); yes?

24 MR. SCHOENBERG: Yes.

25 THE COURT: All right.

1 Let me hear from plaintiff's counsel.

2 THE COURT: Okay, that's agreeable? You have been  
3 admitted pro hoc --

4 MR. REDDY: Subsection (e).

5 THE COURT: -- without, although close call, of  
6 course.

7 MR. REDDY: I apologize for that, your Honor.

8 Subsection(e) is not supposed to be called pure olive  
9 oil, it is a technical term, so I think it's just (d).

10 THE COURT: You could live with (a) (b) or (d).

11 MR. REDDY: Correct.

12 THE COURT: Okay, how about defense counsel? You're  
13 not selling (e) are you?

14 MR. SCHOENBERG: No. No, we are, actually. In fact,  
15 (a) and (d) oil sales, one of the wholesalers of olive oil  
16 defines their refined olive oil as pure olive oil. And it's  
17 not in the papers, it's on their website, I'll give you the  
18 cite.

19 THE COURT: No. No, my only question is are you  
20 selling something that falls within 52.1534(e).

21 MR. SCHOENBERG: Yes.

22 THE COURT: And this is, we are not talking about your  
23 pomace stuff, we are talking about the new stuff.

24 MR. SCHOENBERG: Currently, correct.

25 THE COURT: Okay. And why does it fall within (e) as



1 opposed to (d).

2 MR. SCHOENBERG: I believe one is a blend, and one  
3 isn't, but it's the refining process.

4 THE COURT: It looked to me like (d) has a, quote,  
5 "has acceptable odor and flavor characteristic of virgin olive  
6 oil." Whereas (e) is flavorless, and odorless, and it's  
7 obtained from virgin olive oils by refining methods -- well,  
8 I -- well, no, I don't know, is your stuff flavorless and  
9 odorless?

10 MR. SCHOENBERG: I have not had a chance to try it.

11 THE COURT: What?

12 MR. SCHOENBERG: No comment.

13 If you look at subsection(e) in the middle of that  
14 paragraph, the sentence starts capital O, Olive oil, olive oil  
15 falls within this classification, et cetera, et cetera. This  
16 is olive oil by the USDA's definition. This is 100 percent  
17 pure, quote/unquote "olive oil." It is different than (d. I  
18 can't -- I am not a scientist, I can't tell you why the USDA  
19 has broken the categories between (d) and (e), other than the  
20 say the definition is one is a blend.

21 THE COURT: Let me ask plaintiff's counsel.

22 Has the association taken the position that someone  
23 who is selling (e) can't label theirs as olive oil?

24 MR. REDDY: No, your Honor. The issue is the word 100  
25 percent pure. And the way that the industry --

1 THE COURT: So how can refined be pure?

2 MR. REDDY: Yeah.

3 THE COURT: And you're labeling your stuff as 100  
4 percent pure.

5 MR. SCHOENBERG: Yes, but just because something is  
6 refined, doesn't mean it is not pure olive oil.

7 THE COURT: Well, I don't know much about olive oil,  
8 but I do know that under the ordinary meaning of the word  
9 "pure" and the ordinary meaning of the word "refined,"  
10 something that is refined is not pure.

11 MR. SCHOENBERG: Well, you can look at the other  
12 definitions that fall under the grades of quote/unquote "olive  
13 oil," as defined by USDA. And they are also refined. (d)  
14 US olive oil, US quote/unquote "olive oil" is the oil  
15 consisting of a blend of refined olive oil.

16 THE COURT: Where are you looking at?

17 MR. SCHOENBERG: Sub (d) 52.1534 as refined --

18 THE COURT: But that doesn't use the word "virgin."  
19 Your -- or "pure," excuse me.

20 MR. SCHOENBERG: But the association is saying that  
21 sub(d) would be fine if we labeled it as 100 percent pure olive  
22 oil. Because it is not refined. Well sub(d) is refined. In  
23 fact, olive oil is refined. But the USDA defines the olive  
24 oil. And, again, I'm quoting olive oil as any one of those  
25 grades, if it has 100 percent of these grades, it is olive oil.

1 THE COURT: What is crystal clear is that none of  
2 these (a), (b), even (c), let alone or (d) or (e), contains  
3 pomace, right?

4 MR. SCHOENBERG: We'll agree. Yes, that's true.

5 THE COURT: So let me go back to plaintiff.

6 Your problem with using (e) is the use of the word  
7 "pure?"

8 MR. REDDY: Yes, your Honor.

9 THE COURT: In connection with (e).

10 MR. REDDY: Yeah, the prevailing industry standard for  
11 the use of the word "pure," is essentially what is codified by  
12 USDA as subsection (d). And that the use of the word "pure"  
13 corresponds to blending. With refined oil with, there is a  
14 little bit of --

15 THE COURT: You would have no problem with their  
16 saying as 100 percent olive oil, something that fell within  
17 (e).

18 MR. REDDY: Correct. The question is the word "pure."

19 THE COURT: All right, so --

20 MR. SCHOENBERG: Can I?

21 THE COURT: -- let me take another stab.

22 MR. SCHOENBERG: May I be heard a second, your Honor?

23 THE COURT: Yeah.

24 MR. SCHOENBERG: I disagree with Mr. Reddy's assertion  
25 that that's the industry standard.

1           If you look at exhibit J, for example, of our motion  
2 papers, you'll see a screen shot from Botticelli, again, not an  
3 association member, where they are describing 100 percent pure  
4 olive oil, as Botticelli 100 pure olive oil is a high quality  
5 blend of virgin refined olive oils. And if you look at --

6           MR. REDDY: Exactly what subsection (d) is.

7           THE COURT: So, I mean I -- it looks to me, that -- by  
8 the way, is it important to you to say the word "pure" in your  
9 ads?

10          MR. SCHOENBERG: Yes. And I'll tell you why.

11          THE COURT: And what is it you seek to convey with the  
12 word "pure."

13          MR. SCHOENBERG: That it is nothing but olive oil.  
14 It's not extra virgin, it's not virgin, but it's olive oil. It  
15 is not canola oil, not seed oil, not vegetable oil, it's olive  
16 oil.

17          THE COURT: Here's what I'm going to do. It does  
18 sound to me like there is substantial agreement among the  
19 parties as to the injunction I propose to issue. But you can't  
20 quite work out a wording, yet, that is agreeable to both sides.

21          So I will give you from now until 2:00 to work out  
22 that wording. And then we'll reconvene at 2:00.

23          If you can't work it out, I'll just do the best I can.

24          But I want to issue -- this is a Friday, I want to get  
25 this injunction issued today. But I'll give you the two things

1 that I am prepared to preliminarily enjoin.

2 It is, basically, any sale of anything that is olive  
3 oil that contains pomace, or contains any other substance that  
4 is not covered by Section 52.1534; and, second, from selling  
5 any product that does contain pomace without labeling it as  
6 containing pomace.

7 Those are the only two things I'm prepared to enjoin  
8 today. So see if you can work out the wording among  
9 yourselves, and I'll see you all at 2:00.

10 MR. TREANOR: Thank you, your Honor.

11 MR. SCHOENBERG: Thank you, your Honor.

12 MR. TREANOR: If I can raise one additional matter?

13 THE COURT: Yeah.

14 MR. TREANOR: And that is the issue of the additional  
15 relief we have asked for, injunctive relief which includes -- I  
16 understand that your Honor has said that you are not gonna  
17 order a recall, but this is issue of notice to the marketplace  
18 with regards to the product that is already out there.

19 THE COURT: I would be -- I agree that's a close call.

20 If there ways a lot of stuff out there, that would be  
21 appropriate. The suggestion is there is not much stuff out  
22 there. And I don't really have much evidence, one way or the  
23 other at this point, it's the representations of counsel. If  
24 there is not much stuff out there, then I am concerned about  
25 both the expense and the potential injury to the reputation of

1 the defendant by a re-call. And to be frank, that is partly  
2 affected by the use made of the press by the plaintiff in this  
3 case.

4 On the other hand, if there is a lot of stuff out  
5 there, then it has to be, not re-called, but there has to be  
6 notice sent to the retailers.

7 So it really turns on that. If there is some more  
8 information by 2:00 that you can give me, I'm happy to hear it.

9 If you want to take the consent injunction today  
10 without prejudice to that on further issue, and then both sides  
11 can give me further date on that, we can take that up next  
12 week, that's okay, too. Because I understand the other side  
13 really necessarily has firm date on that at this point. But  
14 that's the balance in the Court's mind.

15 If there is a lot out there, then the need for notice  
16 becomes sufficient to outweigh the downsides of expense and  
17 possible reputational harm.

18 If it is just little stuff out there, then I think it  
19 the balance cuts the other way.

20 MR. TREANOR: Your Honor, I'm not sure we're going to  
21 be able to dig up data, certainly not by 2:00. But, you know,  
22 this is 15 percent of the -- most recently, at least,  
23 15 percent of the olive oil sold in the United States. It's  
24 typically sold in 101 ounce tins --

25 THE COURT: Yeah, no, I --

1 MR. TREANOR: -- and that's --

2 THE COURT: -- that's a fair point. And I was not  
3 totally -- you know, your adversary says that the real  
4 motivation behind this is his company's success.

5 Well, first of all, I don't know want to speculate  
6 about people's motives. But if the success is based on false  
7 advertising, then it is a success that shouldn't have been a  
8 success.

9 MR. TREANOR: That's right, your Honor.

10 THE COURT: So, I --

11 MR. TREANOR: All we would propose, your Honor -- and  
12 I apologize. All we would propose is notice to the customer --  
13 to the best extent that Kangadis can deliver, based on the  
14 information it has, notice to its customer that have purchased  
15 from it, and request that notice from those customers go to its  
16 customers. Also, notice can be accomplished through --

17 THE COURT: Notice saying what?

18 MR. TREANOR: Saying that the olive oil, 100 percent  
19 pure olive oil sold by Kangadis contains pomace. And the  
20 product labeled as 100 percent pure olive oil contains pomace.

21 THE COURT: Well, I think where I come down is --

22 MR. TREANOR: There is also website notification, your  
23 Honor.

24 THE COURT: I'll take that up at 2:00 as well, but it  
25 wouldn't be part of this. There clearly is going to be a

1 contest over that. So I want to get what I hope you both can  
2 consent to, which is what I just read, in the formulation you  
3 will then mutually hopefully come up with. And that will issue  
4 as a preliminary injunction. I will consider whatever  
5 arguments either of you want to make on additional consent  
6 injunction. Additional preliminary injunction, not on consent.  
7 I doubt -- I'm not wedded to consent. Judges have been known  
8 to make up their own mind.

9 On the issue of notice. So I will take that up  
10 separately at 2:00. But I first want to see if we can reach  
11 agreement on the portions I outlined a few minutes ago.

12 All right, see you at 2:00.

13 ALL: Thank you, your Honor.

14 (Recess)

15 THE DEPUTY CLERK: Please be seated.

16 THE COURT: All right, so were you able to reach  
17 agreement?

18 MR. REDDY: Unfortunately, we were not, your Honor.

19 The dispute between the parties, as I understand it  
20 and Mr. Schoenberg can correct me if I'm wrong, the parties are  
21 in agreement on the second prong of the two prongs.

22 On the first prong, the issue comes down to whether  
23 subsection(d) and whether subsection(e) is included.

24 It's our position that subsection (e) of the USDA  
25 Section 52.134 should not be included, because the prevailing



D4c0nor2

Argument

1 standard in the industry defines "pure" in a way that requires  
2 the blending of some amount of virgin olive oil into refined  
3 olive oil.

4 You can see evidence of this prevailing standard both  
5 on defendant's own website, which defines pure olive oil as a  
6 blend of virgin and refined olive oil. You can see that also  
7 on the two different suppliers that defendant has pointed to  
8 that now it is purchasing olive oil from. Those suppliers also  
9 define pure olive oil as a blend of --

10 THE COURT: Well, this is a false advertising case.  
11 And, ultimately, what we're concerned with are the consumers.  
12 I was going use the standards, only because the parties jointly  
13 thought that might be helpful. But, I must say from the  
14 standpoint of a consumer, I think "pure" normally doesn't have  
15 anything to do with whether it is refined or unrefined.

16 If you think about orange juice. To the average  
17 consumer, I suspect, something that says is 100 percent pure  
18 orange juice means that there is no other substance in there,  
19 that they have not mixed in some other kind of juice or some  
20 water or something like that, so all stuff that comes from an  
21 orange. And by analogy to this case, it's not stuff that comes  
22 from taking the orange skin and smashing it up, because the  
23 juice you get from squeezing the orange. But it could be  
24 refined or unrefined. At least I say this without prejudice to  
25 any evidence that anyone wants to put before me.

D4c0nor2

Argument

1           And "virgin," by contrast, suggests that it comes  
2 directly from the olive, I don't think you ever hear the term  
3 virgin orange juice. But I guess there are no virgins among  
4 oranges. But so as I understand it, what the defendants are  
5 making is totally refined -- now making is totally refined  
6 olive oil. And I don't see why that would be within the scope  
7 of what an ordinary consumer would think of when they said  
8 100 percent pure olive oil.

9           It's clearly not virgin. And they don't say that in  
10 there. And the whole point of this lawsuit was to get rid of  
11 the pomace, and get rid of the passing off pomace as olive oil.  
12 And of course the final determination of the word wouldn't be  
13 until the end of the case. But for preliminary injunction  
14 purposes, I have already indicated I agree that the plaintiffs  
15 have a high likelihood of prevailing on their assertion that  
16 pomace is not what the consumer believes is olive oil.

17           So, I'm a little disappointed that what you both  
18 thought would be helpful, which is a reference to the USDA, has  
19 turned out to be something that's divided you, when I think the  
20 parties are substantially in agreement that the preliminary  
21 injunction should not prevent these defendants from selling  
22 their new product, the product they are now representing they  
23 are making in this respect, as 100 percent olive oil. And,  
24 conversely, no one suggests that they should include pomace.

25           So this is a debate over "pure," and the meaning of

D4c0nor2

Argument

1 pure. And while industry standards may be relevant to that, in  
2 a false advertising case it is really what the consumer  
3 perceives. But if we can't get consent, I'll just figure out  
4 something on my own.

5 Let me make sure upon. Am I right that nowhere in any  
6 of the standards you have given me, from any source, is the  
7 word "pure" defined?

8 MR. REDDY: That is correct. I don't believe that the  
9 word "pure" is defined in any of the standards. I did want to  
10 respond briefly to your comment that --

11 THE COURT: Yeah.

12 MR. REDDY: -- consumers wouldn't think that pure  
13 olive oil would include a blend of virgin along with refined.

14 I respectfully disagree, only because refined, purely  
15 refined olive oil, has no taste or flavor. When a consumer  
16 purchases olive oil, they are purchasing it because they want  
17 the olive oil flavor, they don't want it to taste like corn  
18 oil, they don't want it to taste like canola oil, they want it  
19 to have a little bit of the olive oil flavor.

20 The only way that flavor comes into the equation, is  
21 when you blend it with virgin. That is what the USDA standards  
22 recognizes, and that's why it is important to the consumer.

23 THE COURT: So their product has no flavor.

24 MR. REDDY: A refined product would have no flavor.

25 I don't know what the current -- I have not tasted the

D4c0nor2

Argument

1 current product.

2 THE COURT: All right.

3 Well, their previous product was also -- the one that  
4 contained pomace -- was also 100 percent refined; yes?

5 MR. REDDY: Correct. Their previous product was --  
6 based on their admission, yes, your Honor.

7 THE COURT: Did that have a flavor?

8 MR. REDDY: I don't know.

9 THE COURT: What is striking is that it appears clear  
10 that the respective client in this case hired, as their  
11 counsel, people who had never actually tasted the olive oil in  
12 question.

13 MR. REDDY: I have tasted it, your Honor. I -- I am  
14 not an olive oil expert. I know that the product had --

15 THE COURT: This has nothing do with experts, right,  
16 it has to do with the average consumer.

17 MR. REDDY: No, understood, your Honor. And actually  
18 I --

19 THE COURT: You look like an average consumer.

20 MR. REDDY: And actually, your Honor, I misspoke when  
21 I said that the previous product had no flavor. Actually, when  
22 it was sent for testing, along with the testing that was done  
23 for chemical testing, an organoleptic assessment was done,  
24 which is a sensory analysis. What one would have assumed from  
25 a pure refined product, is that it would have come back with no

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Argument

1 flavor, whatsoever. In fact, this came back with a flavor of  
2 lampante, which is a bad flavor, to put it in laymen's terms.

3 If you looked in the category that the USDA talks  
4 about, it's that's stuff that cannot be fit for human  
5 consumption. L-A-M-P-A-N-T-E.

6 And that that's what the test results from the  
7 laboratory suggested. So I don't know how to square that with  
8 their statement that they have used a purely refined product.

9 That those are the facts that we have, your Honor.

10 THE COURT: Let me hear from your adversary.

11 Thank you.

12 MR. SCHOENBERG: First, I'd say that the Conte report  
13 is hearsay. We have not had a chance to depose Professor  
14 Conte. I am not sure which reference Mr. Reddy is making to in  
15 the report, but to rely on it at this point, I don't think you  
16 can. Lampante --

17 THE COURT: Did you bring a bottle here of olive oil?

18 MR. SCHOENBERG: Funny you should ask, I do.

19 THE COURT: All right, I'll taste it.

20 MR. SCHOENBERG: But it's empty.

21 Lampante is that (c) grade of olive oil not fit for  
22 human consumption, which we're not saying should be excluded,  
23 should be excluded.

24 I have spoken to Mr. Kangadis, who absolutely has  
25 tasted all of these products. And he assures me that

D4c0nor2

Argument

1 Capatriti, when it had pomace oil, has no flavor. Again, the  
2 only reason that you add any sort of virgin olive oil to  
3 refined is to add the flavor. But the point is that refined  
4 olive oil is still pure olive oil. And if you were to make it  
5 US olive oil, by these standards, we could add point zero zero  
6 one percent of virgin olive oil and, boom, we have US olive  
7 oil. It is an illogical argument.

8 THE COURT: No. No, the question is, I agree with you  
9 that these standards may not be helpful, that's -- you know,  
10 you jointly suggest that we use these standards. And it's  
11 creating more problems than it may be solving. But the  
12 question is what is meant by the term "pure." And if what is  
13 meant by the term pure to the average consumer is unrefined,  
14 then that's one thing. If what is meant to the average  
15 consumer is that it doesn't contain anything else but olive  
16 oil, it's another thing. I was suggesting that at least in the  
17 context of orange juice, the average consumer thinks of "pure"  
18 as simply that it is just orange juice, it doesn't contain  
19 anything else, which is essentially your position, if I  
20 understand it in terms of the olive oil. But I don't have any  
21 evidence, one way or the other, and none of the standards  
22 address pure, and it was not the subject of any briefing.

23 So I think we have to go a different route than using  
24 USDA standards, since they don't translate into that.

25 MR. SCHOENBERG: But I guess the point that I was

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Argument

1 trying to make in bringing up the standards, is that we could  
2 do what your Honor had suggested, that does not contain any  
3 pomace or any -- and we can modify the language to be any  
4 substance, instead of "not covered by" you do it affirmatively,  
5 "substance covered by Section 1535" which describes all of the  
6 grades of pomace oil. You make it --

7 THE COURT: Yeah, but that's a -- and that still  
8 doesn't resolve the debate. It's (e) that that the plaintiff  
9 says you should not be within the equation, so to speak, and  
10 which you say should be in the equation.

11 MR. SCHOENBERG: Correct.

12 THE COURT: And that turns, everyone agrees, that (e)  
13 like (a), (b), and for that matter even (c), and (d), is  
14 100 percent olive oil. The debate is whether it is -- whether  
15 (e) is pure olive oil, is it 100 percent pure olive oil. And  
16 nothing you can give me really resolves that. So I think we  
17 have at least agreement on this much, that the defendant is  
18 preliminarily enjoined from selling, as 100 percent pure olive  
19 oil, any product containing pomace. And, from selling any  
20 product containing pomace without expressly labeling it as  
21 such. Right, do we have agreement on that?

22 MR. SCHOENBERG: Yes, your Honor.

23 MR. TREANOR: Yes, your Honor.

24 THE COURT: So let's do this. I will issue, right  
25 now -- as soon as my law clerk can re-type it -- on consent,

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Argument

1 just that limited -- and then I will take up in my chambers  
2 over the weekend all of the other things that you have all  
3 discussed that you cannot reach consent on. And I'll issue a  
4 further order, which may either be more preliminary injunction  
5 or a lack thereof, but some sort of order, early next week.

6 I don't see any reason why this world will come to an  
7 end, between now and the beginning of next week, especially  
8 given that this order will take effect immediately.

9 So the order that takes effect immediately is, I'll  
10 just read it here aloud, and then we'll file it later today.

11 On consent of the parties, defendant is hereby  
12 preliminarily enjoined (1) from selling, as 100 percent pure  
13 olive oil, any product containing pomace; and (2) selling any  
14 product containing pomace without expressly labeling it as  
15 such.

16 And I'll take up all of the other points, including  
17 the notice point and the re-call point, and everything else, in  
18 the order that I will issue early next week.

19 Okay, anything further we need to take up today?

20 MR. TREANOR: Your Honor, earlier when we met, I said  
21 that I didn't think we would be able to come up with any useful  
22 statistics by 2:00. We do have some useful information we  
23 think would be helpful to the Court. And that is that  
24 research, market research has shown that Americans consume  
25 approximately 1 liter of olive oil per year. That's a lot less



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Argument

1 than the 24 liters consumed in Greece, which is the highest,  
2 and there are other countries that are lower.

3 THE COURT: Is that why the Greek economy is in such  
4 trouble?

5 MR. TREANOR: Perhaps. Perhaps, your Honor.

6 THE COURT: So the 1 liter, these are sold in 3-liter  
7 tins. Obviously, if you are someone who lives alone, you  
8 probably are less likely to buy a 3-liter continue, than a  
9 family. But I think it's safe to say that a 3-liter tin could  
10 typically last up to a year.

11 We would also note that on the samples provided by Mr.  
12 Schoenberg of the new tins, the sell-by date is a two-year  
13 period of time.

14 So to the extent that the Capatriti 100 percent pure  
15 olive oil is viable on the marketplace for two years, that  
16 means that the containers could be out there. And, obviously,  
17 there will be more sold sooner, rather than later, in that time  
18 period, but it's market viable for two years, probably takes  
19 somewhere --

20 THE COURT: So I see where you are going, let me ask  
21 you a related question; two related questions.

22 First, rather than my issuing this subsequent order  
23 early next week, maybe we should give an opportunity to both  
24 sides to, early next week, make any further submissions on the  
25 issue of what is already out there that, arguably, needs to be

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Argument

1 re-called or, short of that, notified about.

2 So why don't we say any submissions on that, and not  
3 to exceed 10 pages, 10 double-spaced pages per side, should be  
4 submitted to the Court with any attachments that need to be  
5 should be submitted to the Court by 5:00 Wednesday,  
6 simultaneously, both sides. And I'll hold off issuing my order  
7 until the end of the week.

8 With respect to that, though, assuming for the sake of  
9 argument you convince me that there is a lot out there, then --  
10 I was not going to impose any bond on the consent injunction  
11 that I just read, because I don't -- first of all, it's on  
12 consent. And secondly, there is no real costs involved.

13 A notice and/or re-call do involve real costs which,  
14 if you then fail to prevail, ultimately, your adversary might  
15 be entitled to recoup.

16 Is a bond appropriate for those purposes?

17 MR. TREANOR: Well, your Honor, our position is that  
18 it's not. And for the reason that your Honor has observed with  
19 regards to the issue before you on the preliminary injunction.  
20 And that is that pomace is not olive oil. We think the  
21 likelihood of succeeding on on establishing that is extremely  
22 high, that there is no costs involved in --

23 THE COURT: All right, I remember reading that in the  
24 New York Times, your view on that.

25 Well, the point is that I don't know about extremely,

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Argument

1 but obviously I agree with you that the likelihood is very  
2 high, that is why we went down the road we did this morning.  
3 But, that doesn't mean it's impossible that your adversary will  
4 prevail. And that's what bonds are all about, are they not?

5 Now, let me ask a different question, what's the  
6 assets of the plaintiff?

7 MR. TREANOR: Your Honor, the budget of the  
8 association is established, is funded through membership dues.  
9 I'm not going to represent that there are no assets of the  
10 organization other than the dues that flows in to cover the  
11 expenses. I suspect that's the case, but we'll submit  
12 something to the Court --

13 THE COURT: Here's what I'm getting at. We don't need  
14 a bond in a situation where the party requesting injunction is,  
15 you know, an established institution that's always going to be  
16 good for any damages that might occur. That's not the sole  
17 reason for a bond, but it is a relevant consideration.

18 How long has the association been around?

19 MR. TREANOR: 1989.

20 THE COURT: And how many members?

21 MR. TREANOR: Approximately 75 companies, right now.

22 THE COURT: All right. Well, I will think about all  
23 of that. If either, or both of you, want to, in your 10-page  
24 submission, also say a word or two about the bond.

25 My only point is this. For the present injunction, no

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Argument

1 bond is necessary under any analysis. If, for example -- I was  
2 thinking about the notice. The notice without the re-call  
3 somewhat puts the retailer in an odd position. What are they  
4 gonna do, put up their own signs that says this really contains  
5 pomace? Or, are they just going to send it back to the  
6 company. So that puts -- it's an odd kind of thing. And maybe  
7 we should give them some guidance in that -- if the guidance we  
8 gave them, taking at worst case for the defense at the moment  
9 was re-call, and then the Court were to determine, or the Court  
10 of Appeals were to determine, for example, because an  
11 injunction would be immediately appealed, that re-call was  
12 inappropriate, that would be potentially substantial damages  
13 that a bond ought to cover.

14 But if the company, if the association is good for it,  
15 so to speak, under any fair analysis, then maybe it's really  
16 not necessary.

17 So you may want to address that in your papers.

18 THE COURT: Okay. All right, anything else we need  
19 take up today?

20 MR. TREANOR: Not from the plaintiff.

21 MR. SCHOENBERG: No, your Honor.

22 THE COURT: Thanks so much.

23 (Adjourned)  
24  
25